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THE SIGNIFICANCE OF THE "DIVESTING THEORY" IN THE REGULATION OF MILK

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The divesting theory, by means of which Congress divests certain articles of their interstate character, has become associated in our popular thinking with the problem of liquor regulation. The history of the Agricultural Adjustment Act and of state acts of a similar character demonstrates the need of a utilization of this theory in the field of milk regulation. It shall be our purpose to show (1) the present legal status of milk regulation, federal and state; (2) how the divesting theory functioned in the field of liquor regulation and (3) the potentialities of this theory in the field of milk regulation.

1. THE PRESENT LEGAL STATUS OF MILK REGULATION, FEDERAL AND STATE

The commerce clause has become the stumbling block in the present regulation of milk, federal and state. A review of the litigation of the Agricultural Adjustment Administration for the year 1934 shows that the government sustained a serious set-back in two types of milk cases: (A) The government lost two out of three cases[1] in the Federal District courts involving the validity of the Chicago Milk License, although in these cases it was shown that 40% of all milk consumed in the Chicago area was produced outside the state of Illinois. In the two decisions hostile to the government's contention, the court declared that the Chicago Milk License was an attempt by the Federal Government to regulate the *production* of milk, and that the production of milk is not interstate commerce. (B) The

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[1] *United States* v. *Shissler, et al., D. C. N. D. Ill.*, April, 1934 (Won); *Edgewater Dairy Co.* v. *Wallace, et al.*, D. C. N. D. Ill., June, 26, 1934 (Lost); *Columbus Milk Producers Cooperative Association, et al.* v. *Wallace*, D. C. N. D. Ill., Nov. 26, 1934 (Lost). Up to January 1, 1935, there has been no decision by the Circuit Court of Appeals or by the Supreme Court of the United States on the constitutionality of any section of the A. A. A.

government lost seven District Court decisions during 1934[2] involving milk licenses wherein the dairies purchased and sold all of their milk within the same state. In this latter type of case, the government, although admitting that there was no physical movement of fluid milk in interstate commerce to these markets, sought to justify the validity of the federal regulation of fluid milk upon the so-called "butter theory"; that dairy products (butter, cheese, etc.) were and are being transported in great quantities in interstate commerce throughout the country; that the price received by producers for their fluid milk in these markets is so *interrelated* with the price of these products which move in interstate commerce and that the price of the former substantially affects the price and movements of dairy products in interstate commerce, and hence federal regulation of the purchase of fluid milk from the producer for consumption in these Sales Areas is legally justified. But the court refused to accept the argument that these markets were in the "current" of interstate commerce because of the high degree of correlation that exists between the prices of fluid milk and other dairy products.

It is somewhat difficult to distinguish this second type of case from the holding in *Chicago Board of Trade* v. *Olsen*[3] in which the Grain Futures Act was held valid. Purchases and sales for future delivery are not only transactions intrastate in form, but they involve no physical movement of the commodity whatsoever. The court conceded that the curve of grain future prices did not parallel the curve of cash grain prices, and pointed out that the price of grain futures and the price of cash grain were not dependent upon the same factors. But the court found that there was an *occasional, although not a constant* relation between the two and held the act valid under the commerce power on the theory that "Sales of an article which affect the country-wide price of the article directly affect the country-wide commerce in it".[4]

[2] *United States* v. *Neuendorf, et al.*, D. C. S. D. Iowa, Oct. 19, 1934; *United States* v. *Greenwood Dairy Farms, Inc.*, D. C. S. D. Ind., Sept. 27, 1934; *Hill* v. *Darger*, D. C. S. D. Calif., Sept. 7, 1934; *Kurtz* v. *Berdie*, D. C. S. D. Calif., Sept. 7, 1934; *Douglas* v. *Wallace*, D. C. W. D. Okla., Oct. 17, 1934; *Royal Farms Dairy* v. *Wallace, et al.*, D. C. D. Md., Nov. 16, 1934; *Melwood Dairy, et al.* v. *Sparks*, D. C. W. D. Ky., July 2, 1934.

[3] 262 U. S. 1 (1922).

[4] At p. 40.

It should be unnecessary to labor the point that under the present legal set-up the federal government is having tough sledding in regulating milk by way of license under the commerce clause. The two factual situations discussed above obviously include substantially every milk market. But this is only one-half of the picture. To what extent is the commerce clause a stumbling block to effective *state* regulation of milk? An analysis of the case of *Seelig v. Baldwin*[5] will indicate the need of a new legal mechanism. It is our contention that the mechanism will be found in an application of the divesting theory.

In the *Seelig* case the court held unconstitutional Section 258(m) (4) of Article 21(a) of the New York Agriculture and Markets Law enacted in 1934 and the regulations thereunder,[6] as a direct burden on interstate commerce. The state of New York had created a system of price control over the sale of milk, in pursuance of which it was provided that no milk shall be sold within the state which is bought outside at prices less than those fixed for the purchase of milk from farmers within the state. The plaintiff, a New York milk dealer buys its milk in Vermont and the milk is shipped in cans from Vermont to the New York market. The defendant, Baldwin, is the Commissioner of Agriculture and Markets and has refused to issue a license to the plaintiff to sell in New York unless it agrees to obey all orders of the Commissioner, including that just mentioned. The court said "Section 258(m) (4) does not forbid the importation of milk into New York from outside; it merely prevents its sale when it gets there, unless it has been bought at the price which must be paid for similar milk in New York." The court held "that the original cans . . . were bona fide unbroken packages; they are still a part of interstate commerce . . . Although the section in question may be a reasonable incident to the state's internal economic policy, nevertheless it seeks to protect a local industry by excluding foreign competing goods, and that is exactly the kind of activity against which the commerce clauses are primarily directed . . . No matter

[5] U. S. District Court S. D. of N. Y. before Learned Hand, Circuit Judge and Bondy and Patterson, District Judges, decided August 2, 1934.

[6] There was also involved an identical section of the act of 1933: Sec. 312(g) of Article 25.

what the local need, as a nation we are without protective economic barriers between the states, *certainly unless Congress sees fit to allow them*".

2. HOW THE DIVESTING THEORY FUNCTIONED IN THE FIELD OF LIQUOR REGULATION

To understand the divesting theory, sometimes referred to as the doctrine of Congressional permission, as exemplified by the Wilson Act of 1890[7] and the Webb-Kenyon Act of 1913,[8] it is necessary by way of background to refer to two early cases: *Brown* v. *Md.*[9] and *Cooley* v. *Board of Port Wardens.*[10] In *Brown* v. *Md.*, Chief Justice Marshall created the "Original Package" doctrine which has been used as a convenient test for determining the boundary between federal commerce power and state police power.

In the case of *Cooley* v. *Board of Port Wardens* the court out of whole cloth, created a doctrine dividing interstate commerce into two categories: the first, national in character and requiring uniformity of regulation, over which the power of the states is inoperative even in the absence of legislation by Congress; and the second, local in character over which the state may exercise authority until Congress acts. The Cooley case gives no definite answer to the question as to the *criterion* by which the court determines whether the regulations are national or local. The language of Mr. Justice Curtis contains intimations which can be interpreted either way.

In the Cooley case, Congress had acted, but in later cases the court was confronted with the problem of the inference to be drawn from Congressional *silence.* In *Welton v. Mo.*[11] the court said, "Its (Congress's) inaction on this subject . . . is equivalent to a declaration that the interstate commerce shall be free and untrammeled". This doctrine has been followed in many subsequent cases,[12] and it is pregnant with the in-

[7] 26 Stat. at L. 313.
[8] 37 Stat. at L. 699, 700.
[9] 12 Wheat. 419 (1827).
[10] 12 How. 299 (1851).
[11] 91 U. S. 275 (1875).
[12] *Robbins* v. *Shelby County Taxing District,* 120 U. S. 489 (1887); *Hall* v. *DeCuir,* 95 U. S. 484 (1877); *County of Mobile* v. *Kimball,* 102 U. S. 691 (1881); *Escanaba Co.* v. *Chicago,* 107 U. S. 678 (1882); *Covington Bridge Co.* v. *Kentucky,* 154 U. S. 204 (1894); *Missouri* v. *Kansas Natural Gas Co.,* 265 U. S. 298 (1924); *West* v. *Kansas Natural Gas Co.,* 221 U. S. 229 (1911).

ference that the Supreme Court takes the "will" of Congress as the criterion for determining the validity of state regulation. If the court professes to be bound by the "will" of Congress implied from its silence, it cannot logically fail to follow that same "will" when expressed by positive legislation.[13] Chief Justice Fuller in the case of *In re Rahrer*[14] commenting on the criterion to determine when a regulation was national in character and when local said, "We recall no decision giving color to the idea that when Congress acted, its action would be less potent than when it kept silent".

The divesting theory came into its own during the latter part of the 19th century to protect dry states from the influx of intoxicating liquor through the channels of interstate commerce. Iowa sought to prohibit carriers from bringing intoxicating liquors into the state for consignees not duly authorized to receive the same. This legislation was declared invalid in the case of *Bowman* v. *Chicago Northwestern Railway Co.*[15] Two years later the court in the case of *Leisy* v. *Hardin*[16] held that the state of Iowa was powerless to seize shipments of intoxicating liquors from other states while still in the original package.

The Leisy case is a landmark in the development of the divesting theory because of a suggestion made in that case by Chief Justice Fuller. He reasoned that the Iowa statute was passed in the exercise of the police power but that it was inapplicable because of the will of Congress implied from its silence. In the course of his discussion he made this significant suggestion: "Yet a subject-matter which has been confided exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the state, *unless placed there by Congressional action*".[17] The prohibition forces did not delay in acting on the suggestion of the court.

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[13] See the admirable article by W. C. Scott, "State and Federal Control of Power Transmission as Affected by the Interstate Commerce Clause," in 14 Proceedings of the Academy of Political Science 153 (May, 1930).

[14] 140 U. S. 545 (1891).

[15] 125 U. S. 465 (1888).

[16] 135 U. S. 100 (1890).

[17] Ibid. note 16 at p. 108.

In 1890 Congress passed the Wilson Act,[18] which had for its object the abrogation of the rule announced in the Leisy case. The effect of the statute was to permit the states under the police power to regulate interstate shipments of liquor one step earlier than they otherwise could under the doctrine of the Leisy case. However, the court in *Rhodes* v. *Iowa*[19] construed the word "arrival" in the Wilson Act to mean arrival to the consignee and not arrival in the sense that the goods had crossed the state line. Because of this interpretation, the act was deprived of much of its practical effectiveness. The prohibition forces were driven to seek more effective federal legislation and in 1913 Congress passed the Webb-Kenyon Act.[20]

The Webb-Kenyon Act was upheld in the case of *Clark Distilling Co.* v. *Western Md. R. R. Co.*,[21] and this in the face of the fact that the act had been vetoed by President Taft on constitutional grounds.[22] An analysis of this leading case will indicate the nature of the divesting theory.

The court disposed of the contention (1) that the act delegated power to the states in the following language:

"It is true the regulation which the Webb-Kenyon Act contained permits state prohibitions to apply to movement of liquor from one state into another, but *the will which causes the prohibitions to be applicable is that of Congress*, since the application of state prohibitions would cease the instant the act of Congress ceased to apply."[23]

[18] 26 Stat. at L. 313 (1890). The Wilson Act provided: "That all fermented, distilled, or other intoxicating liquors or liquids transported into any state or territory and remaining therein for use, consumption, sale or storage therein, shall upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquors or liquids had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

[19] 170 U. S. 412 (1898).

[20] 37 Stat. at L. 699, 700. The main provisions of this act were as follows: "An Act divesting intoxicating liquors of their interstate character in certain cases . . . That the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States . . . into any other State, Territory, or District of the United States . . . which said . . . liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States . . . is hereby prohibited."

[21] 242 U. S. 311 (1917).

[22] Veto message of the President, 49 Cong. Rec. 4291; Opinion of the Attorney General, 30 Ops. Atty. Gen. 88.

[23] Ibid. note 21 at p. 326.

It has been suggested by Professor Thomas Reed Powell[24] that the operation of such an act is no more a delegation of power than the acts of Congress which permit an administrative authority to determine the conditions on which the law applies, for in permissive legislation, Congress is only substituting state legislatures for administrative bodies. And certainly the practice of permitting administrative agencies to determine the condition on which a law applies is not unconstitutional as a delegation of power.[25]

(2) Is the divesting doctrine in conflict with the doctrine that federal power over interstate commerce (in regulations of a national character) is exclusive? If the federal power in this field is exclusive, Congress could not by any legislation *authorize the state to exercise or share with it in the exercise of strictly commerce power.* The court reconciled these doctrines as follows: (a) In the Clark case it was pointed out that the Webb-Kenyon law brought into play the "identical power" as was exercised in the Wilson Act. (b) In the case of *In re Rahrer* the court construed the Wilson Act and held that Congress in exercising its commerce power may place interstate commerce in liquor where state laws can apply. *No power is delegated; for the state in prohibiting the transportation of liquor, is exercising a reserved power under the constitution, namely, its police power.*[26] (3) With reference to the contention that the Webb-Kenyon Act lacked uniformity the court said:

"There is no question that the act uniformly applies to the conditions which call its provision into play,—that its provisions apply to all states,—so that the question really is a complaint as to the *want of uniform existence of things to which the act applies*, and not to an absence of uniformity in the act itself. But, aside from this it is obvious that the argument seeks to engraft upon the Constitution a restriction not found in it; that is, that the power to regulate (commerce) conferred upon Congress obtains subject to the requirement that regulations enacted shall be uniform throughout the United States. In view of the conceded powers on the part of Congress to prohibit the movement of intoxicants in interstate commerce, we cannot admit that because it did not exert its authority to the full limit, but simply regu-

[24] "The Validity of State Legislation Under the Webb-Kenyon Act," 2 Southern Law Quarterly 112, 125 (1917).

[25] *Field* v. *Clark*, 134 U. S. 649 (1891).

[26] See Bikle, "The Silence of Congress," 41 H. L. R. 200, 219. See also *Foppiano* v. *Speed*, 199 U. S. 501 (1905), wherein the same theory was applied in the exercise by the state of another reserved power, e. g., a license tax.

lated to the extent of permitting the prohibitions in one state to prevent the use of interstate commerce to ship liquor to another state, Congress exceeded its authority to regulate."[27]

(4) After disposing of the delegation and the lack of uniformity contentions and having reconciled the divesting theory with the doctrine that federal power is exclusive in regulations of a national character, the court proceeded to develop the basic affirmative doctrine to justify the validity of this legislation. Relying on the *Lottery Case*[28] and *Hoke* v. *United States*[29] which the court declared would justify the right of Congress to *completely prohibit* the shipment of all intoxicants in the channels of interstate commerce, the court argued that

"We can see no escape from the conclusion that if we accepted the proposition urged, we would be obliged to announce the contradiction in terms that because Congress had exerted a regulation *lesser in power than it was authorized to exert, therefore its action was void for excess of power.*"[30]

Thus upon the principle that the whole must contain its parts, the act should be sustained as a valid regulation of commerce. And upon the principle of *In re Rahrer*[31] it would operate to place liquor within state jurisdiction as soon as it crossed the border.

(5) Is the divesting theory limited in its application to intoxicating liquor? Mr. Chief Justice White, in the last sentence of his decision indulged in the following *obiter dictum*:

"The exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest, and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guaranties of the Constitution, embrace."[32]

This statement in addition to being dictum does not say unequivocally that the divesting theory is limited to the subject matter, liquor.

The famous case of *Leisy* v. *Hardin*[33] not only contained the suggestion which was responsible for the passage of the

[27] Ibid. note 21 at p. 327.
[28] *Champion* v. *Ames*, 188 U. S. 321 (1902).
[29] 227 U. S. 308 (1912).
[30] Ibid. note 21 at p. 331. See Corwin, "Congress's Power to Prohibit Commerce—A Crucial Constitutional Issue," 18 Cornell Law Quarterly 477.
[31] 140 U. S. 545 (1891).
[32] Ibid. note 21 at p. 332.
[33] 135 U. S. 100 (1890).

Wilson Act but also indicated clearly that articles (other than liquor) may be brought under the divesting theory. The court in that case said:

"The responsibility is upon Congress, so far as the regulation of interstate commerce is concerned, to remove the restriction upon the state in dealing with imported articles of trade within its limits which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action."

Whether an article is of a nature to demand a divesting of its interstate character is a question for Congressional discretion. The exceptional nature of the article goes to the question of *policy—not of power.* There is nothing in the decision of the Clark case (under a proper doctrine of *stare decisis*) contrary to this conclusion.[34] Further the history of federal legislation shows that the theory of Congressional permission has been applied to many articles other than liquor.[35]

(1) Quarantine and health laws passed by Congress in 1790. (1 Stat. at L. 174, 619.) These acts were upheld obiter in *Gibbons* v. *Ogden,* 9 Wheat. 1 (1824).

(2) Congressional act of 1802 prohibiting the importation of slaves in the states having laws against slavery. This was held constitutional in the *Brig Wilson,* 1 Brockenborough 423, 437 (1820).

(3) Revised statutes, Sec. 4280, dealing with the importation of nitroglycerine. The validity of this Congressional "permission" has never been questioned.

(4) Congressional act of 1902 divesting oleomargarine and similar substances of their interstate character. (32 Stat. at L. 193.) Its validity was upheld in the case of *U. S.* v. *Green,* 137 Fed. 179 (1905).

(5) The Lacey Act which prohibits any person from delivering for shipment or any common carrier from shipping game killed in violation of state laws. (35 Stat. at L. 1137, 1909.) The law was upheld in *Rupert* v. *U. S.,* 181 Fed. 87 (1910).

(6) Another example of Congressional permission is the Plant and Quarantine Act (44 Stat. at L. 250, 1926). This statute has not been passed upon by the states.

(7) The Hawes-Cooper Act provides for the divestment of their interstate character of convict-made goods, so as to permit the states to prohibit their sale. (45 Stat. at L. 1084, 1929.) The court has not passed on this legislation.

(6) Congress in divesting an article of its interstate character does not thereby automatically divest itself of the power to control the interstate shipment of such article. The Webb-Kenyon Act was amended in 1917 so as to make a violation of

[34] See Dowling and Hubbard, "The Divesting Theory," in 5 Minn. L. R. 100, 253.

[35] We are indebted to William Campbell Scott for a list of federal divesting statutes dealing with subjects other than liquor. (See *supra,* note 13.)

the act a federal crime.[36] This amendment was sustained in *United States* v. *Hill*.[37] In the Hill case the court said,

> "Congress could . . . forbid a person to bring any intoxicating liquor upon his person, intended for his personal consumption, into a state which forbids the manufacture and sale of intoxicating liquor for beverage purposes, although the state law expressly permits a person to bring that quantity of liquor into the state for his personal use."

It is important to note that although Congress had divested intoxicating liquor of its interstate character, the court held that Congress still has a plenary authority over interstate commerce either in aid of or without reference to the particular policy or law of any given state. The court made this perfectly plain when it said, "It (Congress) may exert its authority, as in the Wilson and Webb-Kenyon Acts, having in view the laws of the state, but it has a power of its own, which in this instance it has exerted in accordance with its view of public policy."

This case would seem to remove the objection raised by Dowling and Hubbard in their article, "Divesting an Article of Its Interstate Character".[38] These writers said,

> "A curious feature of this doctrine seems to have escaped both Congress and the courts. The immediate objective was to sustain state jurisdiction. May not the doctrine contain an unintended and disturbing effect on federal jurisdiction? If it is stripped of its interstate character, has it not also been stripped of its subjection to federal regulation? In other words in divesting an article of its interstate character, does not Congress also divest itself of the power to control the interstate shipment of such articles?"

3. THE POTENTIALITIES OF THE DIVESTING THEORY IN MILK REGULATION

The foregoing discussion demonstrates (1) that a Congressional divesting statute would prevent the repetition of another *Seelig* v. *Baldwin* case,[39] where milk was shipped from Vermont in cans into the New York market. Such a statute would make state police power effective to cope with this situation. (2) If the higher courts do not overrule the two Chicago Milk License cases[40] wherein the district courts denied the right of federal regulation, although it was admitted that 40%

[36] Reed Amendment, Ch. 162, 39 Stat. 1058, 1069, March 3, 1917.
[37] 248 U. S. 420 (1919).
[38] 5 Minn. L. R. at 208.
[39] See note 5, *supra*.
[40] See note 1, *supra*.

of the milk was shipped into the Chicago market from other states, it will result that this kind of a market, under the present legal set-up, cannot be regulated at all, by either federal or state legislation. A federal divesting statute will permit the states to deal with this problem and they will escape the *Seelig* v. *Baldwin* doctrine. The divesting theory also appears to offer a greater chance for cooperation between the nation and the states. The United States Circuit Court of Appeals has said,

> "The Central Government was not created to be an opponent and a rival of the state governments, but to be a supplement and a protection to them. Its numerated powers, although supreme and sometimes exercised to the dissatisfaction of some states, are not misused when by happy concord of duty these governments can cooperate . . . such cooperation between state and Central Government is not constitutionally wrong, but right and desirable."[41]

The proposed suggestion therefore transforms the commerce clause from a stumbling block into an effective instrumentality for opening up a cooperative method of dealing with the milk problem.[42]

In another article, shall be discussed the problem as to whether Congress can impose ITS policy on the states under a divesting scheme by (1) adopting a system of CONDITIONAL divesting, i. e., divesting articles of their interstate character in those cases wherein the states have accepted the federal standards of regulation and (2) by imposing federal duties on state officers.

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[41] *Amazon Petroleum Corp.* v. *Ryan, et al.*, 71 Fed. (2d) 1, 8 (1934).

[42] The seven District Court decisions (see footnote 2, *supra*) repudiating the government's "butter theory" in those markets wherein the dairies purchased and sold all of their milk within the same state, would seem to invite state regulation, even in the absence of divesting legislation.